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NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

February 17, 1989

Office of General Counsel

Mr. Reuben Lansky
21-25 34th Avenue
Long Island City, N.Y. 11106

Re: Disclosure of Bankruptcy or Loan Loss Information of FCU Board Nominees (Your November 14, 1988, Letter)

Dear Mr. Lansky:

Your letter to Senator Jepsen, the Chairman of the NCUA Board, was referred to this Office for a response. Reconsideration of our prior opinion has caused a considerable delay in responding. We apologize for this delay.

Your letter sets forth concerns over a previous opinion letter of this Office dated October 25, 1988 (enclosed). In that letter we expressed the opinion that FCU members have a right to cast informed votes for board of director candidates. Based on this premise, a member who places his or her name before the members as a candidate for the board is open to questions concerning his or her qualifications, including financial information on any losses the nominee has caused the FCU. The board of directors will be managing the FCU, and hence, the member's funds. We believe our interpretation provides FCU members with valuable information to be used in determining the qualifications of potential members of the FCU board of directors. Of course financial expertise is not the only qualification that makes a person a good candidate for the board of directors of an FCU. The fact that a board nominee or member has filed for bankruptcy or has caused a loss to the FCU does not disqualify the member from running for a position on the Board. The

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remainder of this opinion will discuss several points raised in your letter.

You are concerned that our opinion does not rest on a legal precedent. We would like to assure you that the legal opinion concerning waiver of the confidentiality protections of Article XIX, Section 2, of the FCU Bylaws rests on firm legal theory. Blacks Law Dictionary (1979) defines implied waiver, in part, as follows: "[a] waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled..." There are many cases discussing shareholder waiver of the protections found in a corporation's bylaws. (See, e.g. In re Roosevelt Leather Hand Bag Co., 68 N.Y.S.2d. 735 (N.Y. Sup. Ct., 1947); Calwell v. Kingsbery, 451 SW2d 247 (Tex Civ. App., 1970) and Frankel v. 447 Cent. Park West Corp., 28 N.Y.S.2d. 505, affd. 263 A.D. 950, 34 N.Y.S.2d 136 (N.Y.A.D. 1 Dept., 1942)

You also believe that our opinion letter would result in a sitting director becoming "incompetent to run for office solely because he has defaulted on a loan." Our letter should not be interpreted to arrive at such a conclusion. As you pointed out in your letter, "financial expertise is not a prerequisite for corporate directors,..." but I believe you would agree that a certain level of financial discipline is a factor to consider in choosing a board member. We did not state that an individual becomes incompetent to run for the board, but rather that certain information about him or her can be made known at a membership meeting.

You are also concerned that financial information of joint account holders, when one of those joint account holders wishes to run for the board, could become available to the FCU membership. It is the board nominee's qualifications for serving on the board which must be examined by the members, not joint account holders.

You asserted that there could be a dampening effect on volunteering for credit union service because board members could not be sure if they would default on a debt in the future. We disagree. The fact that a board nominee or sitting board member has defaulted on a debt or has filed for bankruptcy does not disqualify that person from running for or sitting on the board. We merely believe that such information can be made to the available to the members when an individual is running for the board.

Lastly, as we stated in our opinion letter, we caution FCU members presenting statements against board nominees that certain Federal or State laws may restrict statements made against a board nominee -- e.g., the Federal Bankruptcy Act and orders issued thereunder and state libel and slander laws.

Sincerely,

Hattie M. Ulan

HATTIE M. ULAN
Acting Assistant General Counsel

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enclosure

NATIONAL CREDIT UNION ADMINISTRATION
Washington, D.C. 20456

October 25, 1988

Office of General Counsel

Jacqueline A. Owens, Esq.
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Re: Disclosure of Bankruptcy or Loan Loss Information on FCU Board Nominees (Your July 7, 1988, Letter)

Dear Ms. Owens:

You have asked whether a Federal credit union ("FCU") officer, director, committee member, or employee may oppose a nomination from the floor on the ground that the member has caused the credit union a loss through default or bankruptcy, in spite of the provisions of Article XIX, Section 2, of the FCU Bylaws. In our view, any director, officer or employee of the FCU could oppose the nomination of an individual who has caused a loss to the FCU through bankruptcy or failure to repay a loan without violating Article XIX, Section 2, of the FCU Bylaws. By permitting his or her name to be placed into nomination, that person represents to the FCU members proficiency in handling financial matters, and implicitly waives the right to confidentiality of impeaching information -- such as the fact that the person has caused the FCU a loss -- held by the FCU's officials. FCU officials' disclosures are subject to other limitations outside FCU law, however -- e.g., a bankrupcy court order and state libel and slander laws.

BACKGROUND

In our letter to you dated March 31, 1988, we stated that ". . . a nomination proposed from the floor may be opposed on

the ground the member has caused the FCU a loss through bankruptcy." Several of your constituents have questioned you concerning the appropriateness of this statement in light of Article XIX, Section 2, of the FCU Bylaws, which provides:

> The officers, directors, members of committees and employees of this credit union shall hold in confidence all transactions of this credit union with its members and all information respecting their personal affairs, except to the extent deemed necessary by the board in connection with:
>
> (a) The making of loans and extending lines of credit.
>
> (b) The collection of loans.
>
> (c) The guarantee of member share drafts by third parties.
>
> In accordance with the above, the board of directors may authorize participation in:
>
> (a) A credit reporting agency if it has determined that use of such an agency is essential in the making of loans and extending lines of credit and that information supplied by the credit union concerning its members will be made available only to legitimate members belonging to the agency and persons who have a legitimate business need for information in connection with a business transaction involving a consumer.
>
> (b) A consumer reporting agency if it has determined that information supplied by the credit union is essential to the guarantee of member share drafts by the agency.

ANALYSIS

In our view, a candidate for FCU board of directors has implicitly waived the protection of Article XIX, Section 2.

When an FCU member places or permits the placement of his or her name in nomination for a board of directors position, that person is representing to the members a certain level of expertise in financial matters. This representation must be open to authoritative impeachment if the member's are to be able to cast informed votes. A member's bankruptcy or failure to pay a loan from the FCU is appropriate impeaching evidence of a person's financial expertise. We see no violation of Article XIX, Section 2, of the Standard FCU Bylaws, then, where an officer, director, committee member, or an employee of an FCU opposes a nomination from the floor: (1) on the ground that the member has caused the credit union a loss through bankruptcy or (2) on the ground that the member has defaulted on a loan and thereby caused the FCU a loss.

However, we caution members presenting such evidence that certain Federal or state laws may restrict statements made against a board nominee -- e.g., the Federal Bankruptcy Act and order issued thereunder and state libel or slander laws.

Sincerely

TIMOTHY P. McCOLLUM
Assistant General Counsel

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